Olivia PIRTAC

Some Aspects of Access to Information Law Enforcement or Several Lessons from the First Law Suit Based on It

The Timpul newspaper was the first to dare to start an official struggle against the unjustified concealment of information (or maybe the first one to have run out of patience in putting up with a disturbing reality). Not much effort was needed: several phone calls, a written request, disregard and—there was a reason. A law suit was started. The suit was lost in the first instance. The ending is still uncertain. However, the "adventure," as things have been developing so far, has become a subject of reflection and generated several lessons.

The story started on 11th February 2003, when a Timpul reporter called the Ministry of Education and requested the following information: biographical data of a public officer (AR) who had been appointed a day before by the Minister of Education, not without a scandal, to an important position. The answer was rather brutal, and one officer said that "biographical data are secret information which can be released only after the minister's approval." The last chance was to secure such an approval, but the minister, of course, was not to be found on that day. Hurt and furious, the Timpul staff were ready to sue the Ministry, but after talking with an expert in the field, they were advised to first submit a written request to the Ministry. In the letter, addressed to Minister Gheorghe Sima and submitted on the same day, the director of the publication recounted what had happened on that day, referring to domestic and international law, and asked the Minister "to explain the grounds of the refusal given by the Ministry's staff to supply public information to the press," also warning that a law suit would be started if the request were not responded to as per law. The whole story was recounted in the Timpul of February 14, and on February 17 I was asked to start the suit and represent the paper. When I said that according to the Access to Information Law one had to wait for 15 working days for a response, the Timpul reporter was surprised and also somewhat disappointed. But some time later the suit was started, since the Ministry of Education did not send any reply, as most state bodies usually do even if they don't actually supply the requested information. It is from that stage on that some important lessons can be derived for the benefit of journalists.

The first conclusion, which is not a very happy one for journalists, is that the Access to Information Law1 does not provide for optimal time periods in which information should be supplied. Thus, the Law provides that "requested information, documents shall be supplied to the applicant from the moment when they become available for distribution, but not later than 15 working days from the day on which the access to information request has been registered" (art. 16, para. (1)). The period for supplying the information or documents may be extended by 5 working days by the manager of the public institution involved if the request concerns a very large amount of information or if additional consultation is needed to satisfy the request (art. 16 para. (2)). In some countries, which are proud of their access to information laws, the supply period is even longer. This can largely be explained by the fact that this law is not intended to offer guarantees specifically to journalists, that is the profession that usually needs information in a very timely manner. The law is a general one and aims at guaranteeing the right to access information for any citizen. And searching for certain information can indeed sometimes be difficult, and sometimes a thorough search in the archives may be needed. This does not mean, however, that journalists should ignore such a law, which has been happening in many countries that have good access to information laws. For instance, journalists from Hungary told me that they practically don't use such a law, because it is easier for them to obtain such information by other means, from alternative sources, which is faster and without many formalities. However, regular citizens apply this law much more frequently, and in Hungary there is an ombudsman whose mission it is to defend the right of citizens to obtain public information. But in such an untransparent society as the one in Moldova, it would not be appropriate for journalists to act as the Hungarians for several reasons. One is the importance of starting the process of enforcing the law and changing the mentality of public officers, who must become aware of this law and must observe it: how can public officers learn about the provisions of this law if people requesting information do not refer to it expressly? Second, although the law provides for a maximal term of supplying information in 15 working days, and this term will count mostly during a litigation, the general rule however is that the public body should supply the information "as soon as it is available," but not later than 15 working days. So, normally journalists have the right to expect the fastest response possible. Another important reason is that the law can be used effectively for conducting investigations, i.e. journalistic work which requires longer periods of time to

be completed. We are not speaking here about the psychological implications of making references to the law and of identification with the profession of journalism.

The second lesson is linked to the first one and refers to the form of the written request and the significance of the oral request. The law is meant to ensure the right to access information for citizens even in circumstances when they request the information orally. The bulk of the most innocent information ought to be supplied this way. But if the information is not supplied immediately or if the supplier tries to refuse such information, then what will become important is a written request that should include the following: a) sufficient and conclusive details for the identification of the information requested (its one or several parts); b) an acceptable way of receiving the requested information; c) identification data of the applicant (art. 12 para (2)). The Law also provides that "except when personal data are requested, the applicant may not include his/her identification data in the request" (art. 12 para. (3)); I believe this provision is still-born for several reasons. One is that I believe public officers are unable to understand that they have to respond to a request in which the applicant is not identified, since they refuse to provide even the most innocent information by phone until they interrogate you about who you are, where from, and, very often, why you need that information. The other reason is that it is very difficult to conceive of answering a person who has not identified him/herself: whom to address the answer to, to what address it should be mailed, and how to know that the letter will reach the applicant and not somebody else, or that it has reached its destination at all? In a society in which supplying information is a well-established process this provision can work very well even in the case of written requests, but in our society the person who will try to use these provisions may face more difficulties than extract benefits. It is advisable that the request be re-gistered and the applicant keep a copy with registration information and the signature of the public officer concerned, for otherwise the request may get "lost" and defenses like "I made this request on such-and-such a date" will not be very convincing.

Now let's go back to Timpul's request: if the reporter asked by phone for some biographical data on Mr. AR and was refused indirectly (the Minister's approval was needed), that is the refusal was not definitive, then in the written request the reporter had to ask expressly "for explanations of the reasons why Ministry of Education employees refused to supply to the press public information." But even the information discussed during the phone conversation was also not requested expressly. Why? Maybe this was a mistake, but, more likely, the journalists did not know about the 15-day term and the priority of the written request. If Timpul wanted to avoid difficulties during the law suit it had to use a formulation that would emphasize both components: the request to receive the information, which had to be described as specifically as possible ("we hereby request data concerning the educational and professional background, and the merits of Mr. AR," thus emphasizing that data which might be strictly private were not needed), as well as a second component to the effect "explanations of the reasons for refusal." Had this been done, the defendant (M. of Education) could not have pretended, as it has done, that the written request contained no solicitation of information but only of explanations concerning the refusal, which did not represent official information and hence the Ministry was under no obligation to supply it; the judge liked this idea so much that she became attached to it from the very first day of trial, thus straying from the principle of judicial impartiality in a law suit, and she made clear ab initio that whatever we said wouldn't matter much. She discussed numerous times the chain of counterargumentation that we presented, interrupting us, and even dared to refuse our request to attach to the file our written counterarguments to the defen-dant's references. It was a surprise to discover that a Court of Appeals judge could refuse the exercise of rights stipulated clearly in the Civil Procedures Code (CPC). We had to make an additional request in which we referred to our rights stipulated in art. 31 CPC, and only then did the judge accept, with an expression of disgust, to attach to the file our counterarguments. In fact, somebody told me that this is a tactic employed by judges who know beforehand the ruling they are going to make: they would do anything to prevent the full, fluent and persuasive presentation of the arguments of one of the parties. Who is to blame: the given individual or the system in which the independence of a judge had become a chimera?

In our turn, we tried to argue our position by showing that the "requests concerning the access to information forwarded by Timpul are perfectly valid under the Access to Information Law and represent a binding ground for taking measures (starting some actions) by the Ministry of Education. According to art. 12 of the Law, requests may also be made orally. According to para. (4) of art. 12 of the Law, 'In the case when the supplier refuses the access to the requested information, he/she shall inform the applicant about it as well as about the possibility to make a written request.' At this stage, the Ministry of Education officers violated the Law for the first time: they neither supplied the information nor informed about their refusal and the possibility for a written request to be submitted. However, Timpul did submit a written request on its own initiative, which is in compliance with the requirements stipulated in art. 12. This request is fully linked to the unsolved oral request and identifies the information wanted:

Mr. AR's biographical data or the reason for refusing such information (either one or the other). The Ministry of Education, as the supplier of information bound by law, had to observe the letter of the law. We should also mention that under art. 19 para. (1), 'The refusal to supply a piece of information, an official document will be made in writing, with a specification of the date when the refusal was made, the name of the officer in charge, the reason for the refusal, and a compulsory reference to the law (title, number, date of adoption, source of official publication) on which the refusal is grounded, as well as the procedure to appeal the refusal, including the term of limitation.' During the term set by art. 16 of the Law, the Ministry of Education took no measure that would show minimal respect for human rights (art. 34 Constitution, Access to Information Law…) or the smallest attempt to observe the provisions of the Law. On the contrary, the Ministry showed total lack of consideration and ignorance, despite the fact that it had been warned about this, in the press too."

During the following session we revisited the point concerning the unity of the requests: "the last meeting left us with the impression that both the defendant and the judge insisted upon the idea that Timpul's phone (oral) request and the written one did not refer to the same object (the same information), were reciprocally complementary, but rather represented completely different things, and while the phone (oral) request was referring to Mr. AR's biography, the written application was requesting only an explanation regarding the refusal to supply such information, but not the information itself. We insist that both requests should be regarded as a single unit since they were based on the same motivation, object and goal, with the difference that the written request was made only after the access to the information requested had been refused indirectly.

"Had the M. of Education had the intention to supply the information (which it does not pretend), it would have supplied it following the request, knowing that only thus it could avoid a law suit, and demonstrating at least transparency and respect for the individual."

At the same time, we even accepted their way of thinking, proving to them that they had violated the law by not providing any answer: "If you don't accept these arguments, you should be aware of the fact that even if we should interpret our request as referring only to 'explanations,' it has to be responded to under the Access to Information Law, as 'explanations' in this case represent 'official information' under art. 6 para. (3). According to this article, official information is divided as 'documented' and 'undocumented,' while explanations of any kind that authorities can supply are, as a rule, 'undocumented information' that should be supplied as per Access to Information Law."

To be sure, none of these arguments had any effect on the judge, who was ready to reject Timpul's complaint in toto. But the problem was that the defendant and the judge "had something to hang on to" in their argumentation, which should not be admitted in future law suits.

Although the ground for the law suit was the violation of the Law by the absence of any response to the request for certain information, which was a brutal lack of respect for the population in whose service public officers are engaged and, respectively, the motivation of a potential refusal had no importance as it had to be made in writing within the time period provided for by law, the defendant nevertheless decided to secure additional guarantees against an eventual obligation to supply the information, claiming that the information requested was "personal" and could be supplied only upon the consent of the person concerned. This argument is quite easily refuted, since under art. 7 para. (2) point c) access to official information may be restricted in the case of "personal information, whose disclosure is considered as interference into the privacy of an individual, which is protected by law, and the access to which can be granted only under article 8 of the present law." Under art. 8 para. (1) "personal information" is defined as "data referring to a private individual, identified or identifiable, whose disclosure would be a violation of privacy." The Law also stipulates that under its provisions the "data referring exclusively to an individual's identification (data contained in the ID card) do not represent confidential information." During the proceedings I drew the attention of the judge to the fact that "personal information" must be supplied in all cases except when it represents data on an individual's private life. But even this latter category of information may be supplied if the individual concerned consents to it. In our case we did not request personal information concerning a person's private life and the defendant had no right to possess such information, since under art. 23 para. (5) of the Law on Public Service2 "it is forbidden to make references, in the personal file and in the register, to a public officer's political or religious affiliation or to his/her private life." We requested data from the biography of a public officer in order to assess the choice made by the authorities, which is our right by law and which is referred to also in art. 2 of the Access to Information Law. But if we are to admit that the biography also contained private information, then we should point to art. 7 para. (3) of the Access to Information Law, which stipulates: "If the access to the requested

information, documents is partially restrained, information suppliers are obliged to supply to applicants those parts of the document which are under no restrictions in terms of access as per legislation, marking the omitted portions by one of the following expressions: 'state secret,' 'trade secret,' 'confidential personal information'. The refusal to provide access to the corresponding parts of a document shall be explained under the provisions of art. 19 of the present law." In the definition of "personal information" contained in art. 8 there is a specification which is almost inactive for several reasons. This is the word "private" in the expression "private person, identified or identifiable." The inactivity of this word is due to the fact that nowhere in the Law there is a definition of this expression nor is there a juxtaposition with the expression "public person." Despite this fact, the expression can't but have some meaning, for otherwise it would have been eliminated when the law was being drafted. The expression is included in the spirit of the principles developed by the European Court for Human Rights, which has separated the notions of "private" and "public" persons, specifying that the latter must bear a higher degree of tolerance than the former concerning criticism of and interference in their private lives. We conclude that the restrictions concerning personal information, specified in para. (2) through (8) of art. 8 of the Access to Information Law refer to all private persons but not to public persons.

The first point during the proceedings was the information to which access had been refused de facto, which was a matter of principle, although it was not clear whether that information could be of any use at that point to the plaintiff. And as a response to the judge's surprise as to why we had not contacted Mr. AR personally and, in general, why we needed a piece of information that we had found from other sources, we pointed out to the following: "Yes, we do request the information that we had asked for on 11.02.2000. We do not know if it can still be useful to us, because we have not seen it yet. It may be, or it may not. But when the law gives us the possibility to obtain information through official channels, we want to have it officially and not have our work disturbed by having to look for other sources. It is our right to find other sources, which is up to us to decide whether to use it or not, but we shouldn't be forced to use this right because public officers don't comply with their obligations."

Besides this criticism of principle there were two more points of principle. One referred to symbolic compensation for damages (less than 20 Moldovan lei) and the other one to imposing an administrative sanction on Mr. Gh. Sima, Minister of Education, whom the plaintiffs considered to be the main culprit in violating their constitutional right to have access to information.

The law also provides for compensating moral damages, but since such damages are associated with suffering and negative emotions they are generally conceived of as potentially present only in the case of individuals and not in the case of organizations. In fact, it is more convenient for an individual than for an organization to start a law suit against violations of the right to access public information. This is also a consequence of the fact that an individual can claim compensation for both moral and material damages, that is damages that can be relatively clearly measured in monetary terms, represented by real damages or missed income. But especially because the state fee for starting a law suit is significantly smaller: according to art. 16 para. (3) of the Law on Administrative Litigations3, upon submitting an application for an administrative law suit, the individual plaintiff is to pay a state fee equaling one minimal salary, i.e. 18 lei, while for a plaintiff which is an organization the fee is 20 minimal salaries, i.e. 360 lei.

One of the experimental claims of the suit was to have Mr. Gh. Sima, Minister of Education, sanctioned administratively by a fine of 150 minimal salaries, as per art.199/7 of the Code of Administrative Offences4 for violating the Law on Access to Information. This article provides that "the violation by a public servant of legal provisions on the protection and guaranteeing of the right to the access to information is liable to a fine from 10 to 150 minimal salaries." To this claim the defendants said that when an offence was committed a record of the offence should be drawn by officers carrying this authority, that this case was not under the competence of the Court of Appeals and, in general, it should not be dealt with under the procedure of Administrative Litigations. We interpreted the law somewhat differently because, as it was interpreted by the defendant, this article was almost impossible to apply. We tried to argue our position as follows: "The offence described in art. 199/7 of the Code of Administrative Offences is, according to art. 209 of the Code, under the competence of courts of law. Although, as a rule, administrative offences are not dealt with under the procedure of administrative litigations, this is not valid also in the case when there is a violation of the Access to Information Law, which follows from art. 24 of the Access to Information Law: 'Depending on the severity of the consequences caused by the illegitimate refusal of a public officer, responsible for supplying official information, to provide access to the information requested, the court of law shall rule sanctions in accordance with the law, the compensation of damages caused by the illegitimate refusal

to supply information or by other actions violating the right to access information, as well as the prompt satisfaction of the applicant's request.' This article shows clearly that the same court dealing with the violation of the right to information decides also on applying sanctions to public officers found guilty. A different procedure is impossible, as the sanction should come after the fact of violation has been established, while the fact of violation can be established only by the court and under the procedure of administrative litigations. The procedure stipulated in the Code of Administrative Offences (chapters 18-22) cannot be applied in the case of art. 199/7 and contradicts art. 24 of the Access to Information Law. Keeping in mind that the Access to Information Law is an organic one and is more recent than the laws which it might contradict, it should be applied (see here the principles described in art. 6 of the Law on Legislative Acts of 27.12.2001). In fact, art. 233 of the Code of Administrative Offences clearly stipulates that the way in which the procedure should be applied to administrative offences can be provided also by laws other than the Code; this is also the case of art.199/7." The judge however did not accept our interpretation of the law, while we have to acknowledge that the law is confusing and does not allow for one single way of interpretation. We can only hope that a new Code of Administrative Offences will clarify the situation and provide an explicit procedure by which it will become possible to examine within a single law suit the violation per se of the access to information right, the possibility to supply information and compensate for the damages caused, as well as applying administrative sanctions to public officers found guilty of violations.

This has been the experience of the first law suit started against a refusal to supply public information, and these have been some conclusions on it. In the end I would like to emphasize the importance of the struggle that we have started. Few can understand why should one go to court for some information that one no longer needs, to claim damages which are less than symbolic and to secure sanctions against a high public official, things which a realist cannot conceive of in our society, and, besides, one also has to pay state fees for all this. No, it's not as simple as when you struggle to recover a debt from someone, to return a job taken away from you against the law, or to gain some benefits. An idealist, however, is able to understand why this struggle is so important. The press, in its capacity as "watch dog," has to work today in extremely difficult circumstances. Perhaps some of these circumstances are objective, but the bulk of the difficulties appear because laws are not quite observed in this country. In particular, it is extremely difficult, or almost impossible, to obtain information from some authorities. When we struggle against a specific violation and claim that specific violators from a specific public authority be punished (who violate our rights and mess up our work), we perhaps fight, first of all, for the situation of tomorrow when our rights would not be violated and we could work in normal conditions. An ideal situation would be when laws were applied by persuasion and we wouldn't have to waste time and money in courts, but as long as the law is not respected, its application by force is the only solution and the last hope.

1 Access to Information Law No. 982-XIV of 11.05.2000, M.O. of RM no. 88-90 of 27.07.2000.
2 Law on Public Service No. 443-XIII of 04.05.1995, M.O. of RM no.61 of 02.11.1995.
3 Law on Administrative Litigations No. 793-XIV of 10.02.2000, M.O. of RM no.no. 57-58 of 18.05.2000.
4 Code on Administrative Offences of 29.03.1985. Art. 199/7 introduced by Law no. 312-XV of 28.06.2001.